

1986

Bountiful, a Municipal Corporation v. Kelly R. Riley and Mary Riley, his wife : Brief of Appellant

Utah Supreme Court

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**UTAH SUPREME COURT
BRIEF**

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IN ~~THE~~ SUPREME COURT
OF THE
STATE OF UTAH

BOUNTIFUL, A Municipal Corporation,)	
)	Case No. 86-0344.
Respondent-Plaintiff,)	
vs.)	
)	
KELLY R. RILEY and)	
MARY RILEY, his wife)	
Appellant-Defendants.)	

BRIEF OF APPELLANT

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FILED
SEP 11

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BRIEF OF APPELLANT

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issue presented on appeal is the determination of the physical location of the south line of 500 South Street and the north line of Block 39 North Mill Creek Plat which is bounded by a 66 foot street known as 500 South Street on the north. The north boundary of said 66 foot street is Bountiful Townsite Additional Plat which cannot be located with respect to original monuments. The plaintiff city claims that a 1927 unofficial resurvey by the city which randomly determined the center lines of streets in Plat A. Bountiful Townsite Survey prevails over physical evidence of the location of home before 1900; sidewalk improvements in 1922; and walls, steps, and

landscaping prior to the 1927 survey. The 1927 survey did not purport to fix the North line of Block 39, but only to find the random centerline of the street as it was then viewed.

STATEMENT OF FACTS

The appellants, Riley, own a tract of land adjoining the south line of 500 South and the east line of 100 East street in Bountiful and reside in a house built thereon by Kelly Riley's parents in 1914. (Tr 89) Kelly's grandfather, Davis, owned the property as part of a larger tract as shown on Exhibit 12, a tax notice of 1906 which refers to the same point of beginning as Riley's tract, to wit, 11.5 rods east of the Northwest corner of Block 39 (Tr97), and Davis built a house thereon in 1890 (Tr101).

In the appendix hereto, there is reproduced a portion of Exhibit A which is the only available plat of Bountiful Townsite which came into existence before 1869 and contains "Plat A" consisting of 54 numbered blocks situated between 400 North and 500 South; and 200 West and 400 East. The blocks were divided into 4 one-acre lots, each with north-south dimension of 165 feet and east-west dimension of 264 feet, excepting the south tier of blocks 1 through 6 which contained only two lots each leaving a wide, area between the south line of blocks 1 through 6, and the north line of Block L. The first mention of a deed reference to 500 South was contained in Exhibit V, dated August 24, 1874, wherein John Stoker as president of John Stoker

& Co. conveys a tract which includes and has the same point of beginning as the Riley tract, i.e., 11.5 rods east of the northwest corner of Block 39, "thence East along the South line of a four (4) rod street...." The deed further recites:

"As we have been informed by our President that the Surveyor Gen'l J.O. Fox has surveyed John Stoker & Co.'s land and have made out to each claimant a deed conforming with his survey for the piece or parcel of land held by him, I move that John Stoker as President of John Stoker & Co. execute each and every of these deeds...."

The deed, Exhibit V, further recites that the tract conveyed "is situated South of Block three (3) Bountiful Town plat...". The reference to Block 3 was at a time in which Block 3 contained only 2 lots, with lot #1 lying east of lot #2 and each having a dimension of 165 feet north to south and 264 feet east to west (Tr 124-125). Later, in 1890 a Bountiful Additional Townsite added Lots 3 and 4 which were only 132 feet north to south (Tr 125).

A concrete sidewalk was constructed by the city in 1922. Exhibit 11 is an extract from minutes of the city counsel, and page 339 thereof dated November 8, 1921, continues a recitation of the sidewalk districts approved including:

"and on both sides of Fifth South Street between the center line of First West Street and the center line of Fourth east Street in sidewalk District No. 11 for the purpose of constructing concrete sidewalks, was passed by the Council by the following vote...."

There is a notation in Exhibit 11 that a motion was made to have the work done under supervision of an Engineer in accordance with plans to be prepared and approved by the City Council. The last page of Exhibit 11 is a report of the city "Board of

Equalization and Review on Special Improvements in Sidewalk Districts Nos. 1,7,11 and 21, to hear the complaints and to equalize the tax proposed to be levied upon the property abutting on both sides of...5th South Street between the center line of 1st West Street and center line of 4th East Street in Sidewalk Deistrict No. 11...". The report concludes with a phrase: "and the Board submits herewith an Ordinance confirming the assessment upon the property abutting said improvement, prepared by the City attorney, and recommends the passage of said Ordinance." The document recites passage of the Ordinance.

Charlotte Riley, Kelley's mother paid the sidewalk tax as shown by Exhibit 13, a receipt from office of City treasurer dated November 16, 1923, "on account of sidewalk tax" (Tr 97). The sidewalk was reconstructed fronting the Riley tract in 1946 and was not changed with respect to its south boundary (Tr 90).

There were no monuments from which the 54 blocks in Plat "A" could be located, and by resolution on March 24, 1927, the city ordered C. William Burningham to make a survey which he completed by April 27, 1927, and was approved by the city. His field notes are Exhibit XX and a plat was prepared in July 22, 1970, and a copy of the blueprint was made September 22, 1948, which is Exhibit WW. An extract of a portion of Exhibit WW is attached in the appendix hereof. Burningham resurveyed Plat "a" by trying to locate those center lines of

the lots based on the use lines (Tr 74). The plat "WW" shows the four lots in blocks 1 through 6 on the north side of 5th South as being equal in width, whereas the Additional Bountiful Townsite survey of 1890 shows lots 3 and 4 nearest the street to be 132 feet wide (the other lots, 1 and 2, are 165 feet wide according to the Plat of 1869, Exhibit A).

No action was taken by the city to alter the location of 5th South street in the vicinity of Riley's property until 1984 when Albertsons desired to change the zoning of property between Main street and 1st East situated south of 5th South to accomodate a shopping center. Exhibit 14 is a report by the city engineer to the planning commission of his review of the Albertson proposal and paragraph 5 thereof is as follows:

"5. This plan calls for the widening of 500 South Street by moving the curb to be adjacent to the sidewalk on both sides of the street. This will also require the re-alignment of the curb for about 150 feet east of 100 East Street. The purpose is to provide room for a left turn lane on 500 South. The developer has asked that the City participate in the cost of this relocation. The City Council will need to address this issue."

The underlined sentence describes action to be taken in front of the Riley property, but no mention is made of moving the sidewalk on to the Riley property.

The city commenced this action to accomodate the Albertson project and alleged two causes for action. The first was that the "Plaintiffs, by virtue of dedication to public use, either actual or implied, are the owners and have right of possession of the real property" describing a six foot wide strip south of the "existing sidewalk". The Second Cause of

Action was in exercise of its right of eminent domain.

The issues of the first cause were set for trial to determine whether the second cause would be necessary. About ten months after trial, the court rendered its findings of fact; numbers 4 through 26 are set forth herein and the appellant desires to comment on those which appellant claims do not conform to the evidence.

EXTRACT FROM FINDINGS OF FACT

"4. That Bountiful Townsite Survey, Plat A, which included the North Mill Creek Plat was filed in the Davis County Recorder's office in 1869 and showed the location of various streets, including 500 South in Bountiful, Utah.

5. The south line of the Bountiful Townsite Survey, Plat A, is 198 ft. north of the north line of Block 39, North Mill Creek Plat. The north line of Block 39, North Mill Creek Plat is the same as the south line of 500 South.

6. That additional property was left between the south boundary of Plat A and north line of North Mill Creek Plat for the addition of other blocks to the south boundary of the original Plat A.

7. That the Bountiful Additional Townsite Survey changed the south boundary of Plat A and added 132 ft. for Blocks 1 through 6 to the south boundary of Plat A.

8. The one hundred and thirty two feet (132ft.) added on the south of blocks 1, 2 & 3, leaves 66 ft., or 4 rods between the south boundary of the Bountiful Additional Townsite Survey and the north line of North Mill Creek Plat.

9. The north boundary of Defendant's property is on the north line of North Mill Creek Plat.

10. That the granting of the original Plat contemplated area being set aside for various streets.

11. The first deed in defendant's chain of title was from the Probate Judge to one John Stoker in December, 1872,

who conveyed the property to one William Thurgood in August, 1874.

12. The description in the August, 1874 deed had a call which began at a point on the east side of a 6 rod street, 11.5 rods east from the northeast corner of block 39, North Mill Creek Plat, thence east along the south line of a 4 rod street....

13. That the description made the north boundary of Defendant's property the south boundary of a 4 rod street.

14. That said description also made the north boundary of Defendant's property the north line of North Mill Creek.

15. That all deeds in Defendant's chain of title since the deed in August, 1874, are tied to the northwest corner of Lot 39 North Mill Creek Plat and thence east, none others have referred to the 4 rod street.

16. That 500 South Street has been in existence as a street as long as anyone can remember.

17. That numerous deeds and subdivision plats over the years bordering on 500 South have tied to the north and south side of a 4 rods street.

18. That Defendant's parents and grandparents have resided on the property since 1916 and have paid taxes thereon.

19. That the Plaintiff constructed a sidewalk in front of Defendant's property in 1922 and assessed the Defendant's predecessors therefor.

20. That the south edge of said sidewalk at the west boundary of Plaintiff's property is 6 feet north of the south line of 500 south as claimed by the Plaintiff.

21. That in 1927 Mr. C. W. Burningham completed a center line survey of the City streets based upon the occupation of said streets at that time.

22. Assuming that 500 South is a 4 rod street measuring from the center line of 500 South as established by the Burningham survey at a point even with the west boundary of Defendant's property and measuring 33 feet south, said point is on the north line of North Mill Creek Plat and is 6 feet inside the present sidewalk on Defendant's property.

23. That the Plaintiff has taken no formal action to

abandon the area between the sidewalk and the south boundary of 500 South street.

24. That Defendant's have constructed no structures of a permanent nature on the area claimed behind the sidewalk, nor was there any evidence that Defendant's had constructed any structures using the sidewalk as a reference.

25. The Defendant's property is located on the southeast corner of the intersection of 100 East and 500 South.

26. That when measuring south from the south line of 500 South and assuming that said south line is the same as the north line of the North Mill Creek Plat, there is sufficient footage to equal the called for front footage in Defendant's deed and that of adjacent property owners to the south."

APPELLANTS COMMENTS ON FINDINGS

#4. Bountiful Townsite Survey Plat A does not include North Mill Creek Plat. Exhibit A is titled "Bountiful Townsite" and the center part consisting of 54 blocks is Plat A, and all other Blocks, including Block 39 are a part of the Bountiful Townsite but not a part of Plat A.

#5. There are no dimensions on the 1869 Bountiful Townsite plat, Exhibit A, which show the width between Plat A and Block 39 as being 198 feet. The lots in Plat A are stated to be 2.5 chains or 165 feet wide and scale 5/8 of an inch. The space between Plat A and Block 39 scales 11/16 of an inch and as such the width would be 181.50 feet. There is no other evidence that the width is other than 181.5 feet which is 16.5 feet short of the 198 feet as found by the Court (Tr 117).

#6. It is true that on the South, West and North sides of Plat A there was additional property shown in the

1869 Bountiful Townsite Plat in the vicinity of what are now partly occupied by 500 South, 200 West and 400 North areas scale equally, and the 200 West area appears to be 16.5 feet wider. There was no evidence as to why the additional property was left as shown surrounding Plat A on the 1869 plat. It was not until 1981 that the additional "lots" were shown as additions to existing blocks, but no new "blocks" were added and nothing on record shows an intention in 1869 to leave the additional area for additional blocks. If a presumption of the reason is to be stated, it was that the area was contemplated to be used for a defensive wall as was in fact built on 400 North, but there is no evidence in the record on this presumption either.

#7. This finding is supported.

#8. Finding No. 8 that the addition of lots 132 feet wide left 66 feet for the road is not supported by any evidence because as stated in comment #5, the width scales 181.5 feet not 198 feet as would accomodate a 132 foot lot and a 66 foot street.

#9. The north boundary of defendant's property is stated and admitted to be the north line of Block 39 North Mill Creek Plat.

#10. It appears from the "original plat the there was area set aside for streets but no dimensions are given for the same and by measurement, 500 South between 2nd West and 4th East would be 181.5 feet according to the "original" map.

#11. Defendants chain of title dates back to Probate Judge Stoker who conveyed to Thurgood in 1874 as found by the Court. (Exhibit V.)

#12, 13, 14, 15, and 16, correctly recite the contents of Exhibit V.

#17. Of the numerous deeds and subdivisions bordering 500 South which tied to the north and south side of a four rod street, only one, Exhibit V (1874) was in the chain of title of Riley and it referred to a survey having been made by "Surveyor Gen'l J.W. Fox" to support the deed.

#18 and #19. The evidence was that Riley's Grandparent, Davis, paid taxes on the property in 1906 (Tr 97) and that Riley's parents built a home thereon in 1914 (Tr 87).

#20. There was no evidence that the sidewalk fronting on Riley's side of 500 South is 6 feet north of the south line of 500 South as claimed by the plaintiff. The evidence in this regard was testimony of plaintiff's engineer that taking the monuments of the 1927 C.W. Burningham survey, and going south 33 feet from what he found to be "use" lines, then the sidewalk would be 6 feet north of a point 33 feet south of the new monument. There was no evidence that the monument location of Burningham conformed to any original plat or any original monuments.

#21. The C.W. Burningham survey in 1927 of center lines of streets in Plat "A" based upon occupation of streets

resulted in several variances from the rectangular dimensions of the original plats as is set forth in detail in the Argument herein (Tr 71-77).

It is true that Burningham completed a center line survey in 1927 based upon occupation of the streets at that time.

#22. Finding No. 22 is not a finding of fact but an assumption.

#23. It is true that plaintiff has taken no formal action to abandon the area between the sidewalk and the South boundary of 500 South street, nor has it ever taken action to claim it until this proceeding.

#24. The defendants have landscaped and exclusively used the area on the house-side of the sidewalk as shown by pictures in evidence and testimony of Riley (Tr 89).

#25. It is true that Rileys' property is located at the southeast corner of the intersection of 100 East and 500 South.

#26. This finding that Rileys retain their frontage along 100 East street is not supported by the evidence. 100 East was not opened as a street until 1936 (Tr 106). The city engineer testified that he made a survey of properties along 100 East and found rivets placed by other engineers and that the property frontages shown on the County recorders plat corresponded to the Burningham survey (Tr 48), but he

did not know who placed the survey markers or when they were set, but since they were in the sidewalk on 100 East he assumed then they were placed within the last 20 years (Tr 55). The engineer, Balling, said there are no monuments marking the North line of North Mill Creek Plat at the present time and he was "relatively sure that sometime in the past the marker was there that was set and all the descriptions are based on it (Tr 56). Balling made no effort to locate the boundary between Riley and his neighbor on the south to determine its physical location but he noted some asphalt pavement along the south line of Riley (Tr 57). Balling did not observe an old oak post at the Southeast corner of Riley's property (Tr 57). Riley testified about the old oak post and identified a photo of the same (Exhibit 7 Tr 92). Riley said the old oak post has been there as long as he can remember and is part of an old fence line corner-post; if you measure from the old oak post a distance of 16 rods (264 feet) towards 500 south street, it measures 10 inches into the sidewalk; and his east boundary is supposed to be 264 feet as recited in the deed (Tr 92-93). Riley's west boundary along 100 East is 198 feet and his neighbor to the south has a fourplex with a parking lot between the fourplex and Riley's property so that the blacktop of the neighbor and Riley's lawn come together without any other markers. The property locations identified by Balling were all after 1936 and presumably made with reference

to the Burningham survey of 1927, conforming thereto in absence of any other survey monuments.

SUMMARY OF ARGUMENT

Assuming that 500 South street has been used as a public thoroughfare at least since 1874 as found by the court and since said time was intended to be 66 feet in width though shown on the 1869 plat as being 181.5 feet in width, the main issue is the determination of the north line of Blocks 39 North Mill Creek Plat which is supposed to be the south line of 500 South Street no matter what the width of the street is supposed to be.

The city created a formal sidewalk district in 1921 and taxed the "abutting" owners for the improvement. The location of the sidewalk is consistent with the old oak post and apparent possession of properties established before 1927.

The Burningham survey of 1927, accomplished in one month, was a survey of Plat A only of the Bountiful Townsite and did not purport to locate monuments for the remainder of the plat known as North Mill Creek Plat. The Burningham survey was not a rectangular survey to establish monuments as per dimensions or relative locations shown on the 1869 Bountiful Townsite (Exhibit A) but was an effort to establish centerlines of streets based upon usage in Plat A as of 1927. The standard rectangular survey distance between intersection markers in Plat A is 379.5 feet. In his survey, Burningham

shows distances along 100 East from 3rd North to 400 South varying from the standard 379.5 foot distance such that instead of measuring 2656.5 for the 7 block distance, he measured 2667.2 feet or 10.7 feet greater distance than the standard, which itself constitutes an encroachment of 10.7 feet into 500 South street.

North Mill creek Plat as it relates to Riley's title dates back to 1874 and a reference to a Surveyor Generals survey. This was prior to the addition of 132 foot lots in Bountiful Townsite Plat A Additional in 1891.

It is error to base a decision on the street boundary location upon a 1927 survey which never purported to establish the north line of Block 39 North Mill Creek plat or any other boundary of North Mill Creek Plat or even boundaries within Plat A. The 1927 survey should be regarded as doing no more than locating intersections in Plat A based upon 1927 usage and the monuments placed pursuant thereto would serve as reference points for future surveys and conveyances but not to upset boundaries established pursuant to original monuments.

The fact that Burningham placed monuments according to the then land usage is a conclusive acknowledgement that such prior usage was the best evidence of ownership and property boundaries.

ARGUMENT

POINT I

THE DEFENDANTS' OWNERSHIP AND POSSESSION OF PROPERTY UNDER AN INITIAL SURVEY IN 1874 AND THE ESTABLISHMENT OF A SIDEWALK BY THE CITY CONSISTENT THEREWITH, IN 1922, ARE CONCLUSIVE AS TO THE BOUNDARY BETWEEN THE STREET AND THE DEFENDANTS' PROPERTY AS AGAINST A 1927 CENTERLINE SURVEY OF THE STREET BASED UPON USE.

The defendants respectfully offer this brief in support of their contention that no property South of the sidewalk is within the street area and is in fact and law the property of the defendants.

Fifth South Street as far east as Fourth east appears to be within a platted area for streets as shown on Exhibit A and is shown to be in its entirety to be North of Blocks K, L, and 39. Defendants' property is bounded on the north line of Block 39.

There are two major, fundamental questions:
(1) where is the north line of Block 39 physically located;
and (2) in absence of the existence of original monuments marking essential corners of the Bountiful Townsite (Exhibit A) what physical evidence and conduct of the parties constitute

the best evidence of the physical location. We are not concerned here with vacating a street because Fifth South has not been vacated.

THE BURNINGHAM RE-SURVEY DID NOT BEGIN AT,
OR PURPORT TO ESTABLISH ANY ORIGINAL MONUMENTS

The city had ordered a resurvey to be made of the area lying west of Fourth East Street, North of Fifth South Street, East of Third West Street and South of Fifth North Street and the placing of permanent monuments at each angle point in the subdividing streets within said area. This was by resolution, not ordinance, on the 24th day of March, 1927 which ordered C. William Burningham to make the survey. Burningham completed the survey by April 27, 1927, and the city, by resolution approved the re-survey. To the extent that the streets as shown on the Burningham plat are not physically located according to the original plat a question remains as to the title to the variances (which appear to be many). Burningham did not establish a rectangular survey but as appears from his notes and plats was compromising between use lines. Although his assignment did not include the south side of Fifth South Street, his field notes show that his "offsets measured to outside of pared walks" and near first east he showed an offset of 28.8 feet south of his bearing line and 31.8 feet north of his bearing line for a total of 60.6 feet to the outside of pared (prepared)

walks. Since his distance from 3rd north to fourth south was 10.7 feet greater than the original plat, and extended to fifth south would be as much as 18.95 feet greater, it appears that the Burningham survey encroaches upon Block 39. The following is an analysis of the Burningham survey.

DISTANCE BETWEEN BURNINGHAM MONUMENTS
Standard Distance: 379.5

	<u>First East</u>	<u>Second East</u>	<u>Third East</u>
2-3N	379.5	379.5	379.5
1-2N	380.9	380.9	380.9
Cen-1N	382.2	380.0	377.6
C-1S	377.8	379.3	381.0
1S-2S	378.3	377.4	376.5
2S-3S	384.7	387.6	390.5
3S-4S	383.8	385.1	386.5
Total	2667.2	2669.3	2671.5
	- 2656.5	- 2656.5	- 2656.5
Difference	<u>10.7</u> feet	<u>12.8</u> feet	<u>15.0</u> feet

Also the distance between monuments from Fourth South to Fifth South varies from 331.5 feet at Third East to 335.8 feet at 1st East.

Burningham shows the lots in Blocks 3 and 4 to be equal in distance north to south, whereas the Additional Bountiful Townsite Survey shows Lots 1 and 2 to be 165 feet and Lots 3 and 4 to be 132 or a total of 297 feet. If we add a street width of 49.5 feet to 297 feet it totals

346.5 feet which would be the distance between monuments instead of the 335.8 feet shown by Burningham. The error becomes even greater where you use 33 feet as one half the distance on 5th South in that you take one-half of the 49.5 feet on Fourth South (24.75) which is 57.75 feet to be added to 297 feet totaling 354.75 feet or 18.95 feet greater than Burningham's 335.8 feet. These indicate that both the plat of Burningham and his figures were never intended to apply to Fifth South Street. Burningham's survey should be construed to apply only to Plat A as a monument reference for use after 1927 or such subsequent date as monuments were placed. We note that Burningham did not sign his plat until July 22, 1940. The Burningham resurvey, accomplished in one month in 1927, between March and April, should not be given any greater consideration than its apparent purpose of providing reference monuments for Plat A.

THE ABUTTING SIDEWALK IS THE
MORE PERSUASIVE MONUMENT

In absence of official survey monuments the sidewalk established by the city pursuant to documents contained in Exhibit 11, is the most reliable indication of the boundary of Fifth South Street. Page 339 of the city minutes (Exhibit 11) recites that sidewalk is to be constructed "on both sides of Fifth South Street between the centerline of First West Street and the centerline of Fourth East Street

in Sidewalk Dist. No. 11 for the purpose of constructing concrete sidewalks...". The last page of Exhibit 11 is a report of the city "Board of Equalization and Review on Special Improvements in Sidewalk Districts Nos. 1, 7, 11 and 21, to hear the complaints and to equalize the tax proposed to be levied upon the property abutting on both sides of...5th South Street between the centerline of 1st West Street and the center line of 4th East Street in Sidewalk District No. 11...". The report concludes with a phrase: "and the Board submits herewith an Ordinance confirming the assessment upon the property abutting said improvement, prepared by the City Attorney, and recommends the passage of said Ordinance." The document recites passage of the Ordinance.

The words "abutting owners" is defined in Ballentine's Law Dictionary and 1 Am Jur 2d 691 as follows:

"Lands which lie along, and are bordered by, a highway "adjoin" the highway in a literal sense of the word, but as used in this work and in legal literature generally, the phrase "abutting owners" is used to designate those whose lands touch a highway or other public place. The distinction is wholly arbitrary, but it answers a useful purpose in that it gives a definite and distinctive classification and avoids confusion that might otherwise arise."

The legal definition as quoted above, would indicate that when the City Attorney prepared the report and Ordinance he was using the word "abutting" in a legal sense meaning that the landowners' properties touched the sidewalk. This is consistent with practice other than in exceptional cases where the exception and reason are usually noted

for justification.

The plaintiff cited as a "landmark" case Tooele City v Elkington, 11 U 476, 116 p2d 406, where the City by resolution quitclaimed an entire alley 49.5 feet in width and 25.48 rods long to one person, Elkington. The Supreme Court reviewed the case of Wall v Salt Lake City, 50 Utah 593, 168P766 as follows:

"The pertinent facts of the Wall case are these: The city had dedicated a street 132 feet wide from Tenth east Street to Thirteenth East Street to be known as Eighth South Street. The adjacent property petitioned that the street be replatted and that the street be cut to but 66 feet in width. The board of commissioners made a personal inspection of the property. It was concluded that the street would never be used as a regular street as the grade was too steep for carriages, there was a gulch which made passage difficult, and the canal crossing the street made an added hazard. Upon determining these facts the street was replatted and the property was taken into the possession of the adjacent property holders. The property taken was then assessed against the holders for some twenty-one years. The court found there was an estoppel in pais as against the city.

In the case at bar, the consideration given the city by Elkington was small, if anything; the deed was made in contravention of the statute; there is no evidence that the property has been assessed against the defendants or their predecessor in interest; the time element is short; and there was not a replatting or a change in the whole neighborhood to the benefit of all adjacent landowners.

Balancing the justices of the cause, we find there is no ground for an estoppel in pais as against the city."

The facts in the Riley Case are within the doctrine of the Wall case, not the Elkington case. Exhibit #12 shows Riley's grandfather to have paid taxes on the premises

in 1906; and his mother, Charlotte Davis Riley paid taxes starting at least in 1916, and paid a sidewalk tax in 1923. The sidewalk was placed in about 1922 and Rileys have occupied and improved to the edge thereof ever since that time. The landowners on the south side of Fifth South as shown by the photos built walls, steps and improvements up to the sidewalk, and enjoyed mental repose as against intrusion by the public across a time honored boundary and common belief that sidewalks in residential areas are the measure of the right of way separating public and private ownership or control. The situation remained unquestioned for over 62 years until Albertsons requested a change of zoning for the area west of 100 East for shopping center purposes. The widening of the street at Riley's is to accomodate the extensive commercial use of Albertsons without also rezoning the Riley property to give it the benefit of commercial value if it is to share the commercial burden.

All of the evidence of the plaintiff is tied to the unofficial re-survey of C. W. Burningham which was not intended to determine the South line of Fifth South beyond recognizing the use line fixed by the "pared sidewalk".

This case has no relationship to the "beaten path" cases where unimproved roads or publicly used trails were later improved. Fifth South was improved with abutting

sidewalks which fixed the boundaries for any previously "beaten path." Plaintiff cites the "present" statute, 10-8-8.2 UCA, enacted in 1955. The statute prevailing in 1922 required an ordinance only on vacating a street, not narrowing the same. The last phrase of 10-8-8 by laws of 1919 read:

"...and may vacate the same or parts thereof, by ordinance."

However, as above noted, this statute is not applicable since the action of the city through the formality of an improvement district designed and constructed sidewalks at the side of the street at the expense of abutting owners and thereby acknowledged and confirmed a boundary which was consistent with the best evidence available and no better evidence has since surfaced.

FURTHER DEFINITIONS OF "ABUTTING" PROPERTY

The city levied its sidewalk tax against the Riley property as "abutting" property of 5th South Street. The statute in effect at the time, Laws of Utah 1921, p. 59, Sec. 674, 15-7-22 Revised Statutes of Utah, 1933, provided for such cost to levied and collected ground "fronting or abutting upon or adjacent to the street...". The city elected to use the word "abutting" in this case. The case of *London v. City of Seattle*, Wash. 611 P2d 781 states:

"Property abuts on a street when there is no intervening land between it and the street."

Also, the case of *Spurling v. Kansas State Park* held:

"Black's Law Dictionary defines abut as "to reach" or "to touch" (4th Ed. 1951 at p. 25). Thus, according to the technical definition, appellees would not be abutting property owners and thereby not entitled to access because their property does not actually border the road."

Bountiful City acknowledged in 1922 that the sidewalk was the boundary between its street and Rileys' property and made no attempt to claim otherwise until 1984.

PHOTOMAPS SHOW SIDEWALK ALIGNMENT

There were introduced in evidence a photomap taken in 1952, a reproduction of which is Exhibit 9, and another taken in 1965, a reproduction of which is Exhibit 8 (Tr 58, 62). The 1952 photo shows the sidewalk alignment from 200 West to 400 East to be a straight line and the 1965 photo shows that the sidewalk was extended (after 1952) east of 400 East and outside of the Bountiful Townsite, in a straight line for several hundred feet. This is further acknowledgment by the city of the south boundary of 500 South being the sidewalk.

POINT II

ASSUMING THAT THE BURNINGHAM SURVEY WERE ELEVATED TO THE STATUS OF A "RE-SURVEY", IT CANNOT PREVAIL OVER BOUNDARIES FIXED ACCORDING TO AN ORIGINAL SURVEY.

The old oak post at the Southeast corner of Rileys' property marked the fences treated by the adjoining property owners as being their boundary long before 1927 (Tr 92-93) and measuring from this post toward the sidewalk on 500 South, to give Rileys 254 feet would go into the sidewalk 10 inches.

The West boundary of Riley is 198 feet long and no monuments or markings fix this point. There was evidence that other properties along 100 East had been surveyed using the 1927 survey and there appeared to be enough land to give Riley 198 feet on his west boundary, however, there was no evidence as to the physical location of the boundary between Riley and the parking lot of the neighbor on the South, other than the existence of the asphalt adjoining the grass in an irregular manner. The judgment of the trial court would have Riley give up six feet of property in his front yard and attempt to regain it in the rear yard where no permanent marker such as a sidewalk exists, and the oak post at the Southeast is not a boundary marker for the southwest except as it relates to original surveys.

The rules with respect to surveys, resurveys, and conflicting surveys are set forth in 73A C.J.S. 486, 487, Public Lands which cites other authority and the Sections 34 and 35 provide in part as follows:

Section 34:

"The purpose of a resurvey is to furnish proof of the location of lost lines or monuments, and not to dispute the correctness of the original survey or to control it. In making a resurvey, the question is, not where would an entirely accurate survey locate the lines, but where did the original survey locate the lines, and in all cases the original survey must be retraced, wherever possible.

Rights which have been acquired under a government survey cannot affected or interfered with by a subsequent survey or by a subsequent correction of a plat."

The Burningham survey was not a "resurvey" and is only what he claimed it to be, a survey to attempt to establish street center-

lines based upon use.

Section 35.

"The survey last accepted by the government before parting with title is the controlling survey, and even though it is incorrect it will prevail over subsequent surveys. Under this rule, an accepted survey covering lands in a particular township has been regarded as controlling as to lands in such township as against a subsequent conflicting survey which purports to cover land in another township. A party relying on a subsequent survey is charged with actual or constructive knowledge of the prior government survey."

POINT III

THE "SURVEYOR GENERAL" REFERRED TO IN THE 1874 DEED TO RILEY'S PREDECESSOR WAS THE EQUIVALENT OF A STATE ENGINEER, WHO CERTIFIED THE DEED DESCRIPTION TO BE A SURVEY OF LAND HELD BY THE GRANTEE.

On page 3 hereof we quoted from Exhibit V, a Deed 1874 from John Stoker & Company to William Thurgood to a portion of Block 39 North Mill Creek Plot, which includes Riley's property. John Stoker & Company received a deed from the probate Judge in 1874 pursuant to territorial laws and an act of Congress.

In the appendix hereto are included excerpts from the Compiled Laws of Utah 1876 which show the territorial laws in effect prior to 1874. On page 94, a provision referred to as "(63.) Sec.1.)" states that a "Surveyor General for the State shall be elected by the General Assembly, whose term of office shall be four years...." Succeeding sections provide that the Surveyor General shall keep a record of all surveys made by himself or reported to him by other surveyors; that he shall

have supervision of all surveys of land made within the State; and shall certify the surveys as being correct.

The deed, Exhibit V, recites and certifies on page 2 thereof, that the Surveyor General, J.W. Fox, has surveyed the land and has made out to each claimant a deed conforming with his survey for the piece of land held by the claimant.

While no monuments of the Fox survey are presently available for reference the old oak post which marks Riley's Southeast corner and the adjoining fence lines and which post is within 10 inches of the 264 foot measurement of Riley's east boundary to the sidewalk, should be deemed the best evidence of what the first official survey established. Also when the city in 1922 placed sidewalks in a straight line from 200 West to 400 East it should be considered as having been done pursuant to a survey abutting the property line on the south side of 500 South street. There was no evidence of any prior survey purporting to fix the north line of 500 South street (Plat A, and Additional Plat A), and any shortage in width of the street should be attributed to the north boundary location, if at all. The 1869 Bountiful Townsite plat, Exhibit A, shows a possible width of 500 South to be 181.5 feet (as scaled). In 1891, the Additional Plat absorbed 132 feet for additional lots, leaving 49.5 feet for the street. Although the deed in Riley's title, 1874, refers to a 66 foot street, the action taken in 1891 establishing the Additional Plat reduces the street area to

49.5 feet. Burningham in 1927 found the distance between the outside lines of "pared" walks to be 60.6 feet at 1st East; 58.8 feet at 2nd East; and 61.2 feet at 3rd East, which is an indication that the sidewalks were placed as far out from the 49.5 foot width as the property use lines and excess property would allow.

In any event, the city should not now be allowed to claim any part of a 66 foot street from the south side where they have already enlarged their 49.5 foot entitlement under the Additional Townsite plat to a distance varying from 58.8 to 61.2 feet.

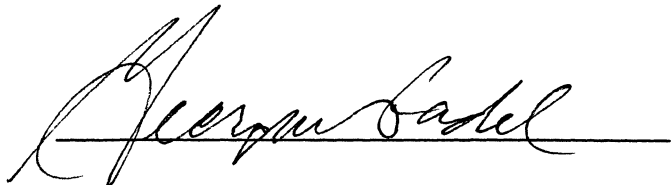
CONCLUSION

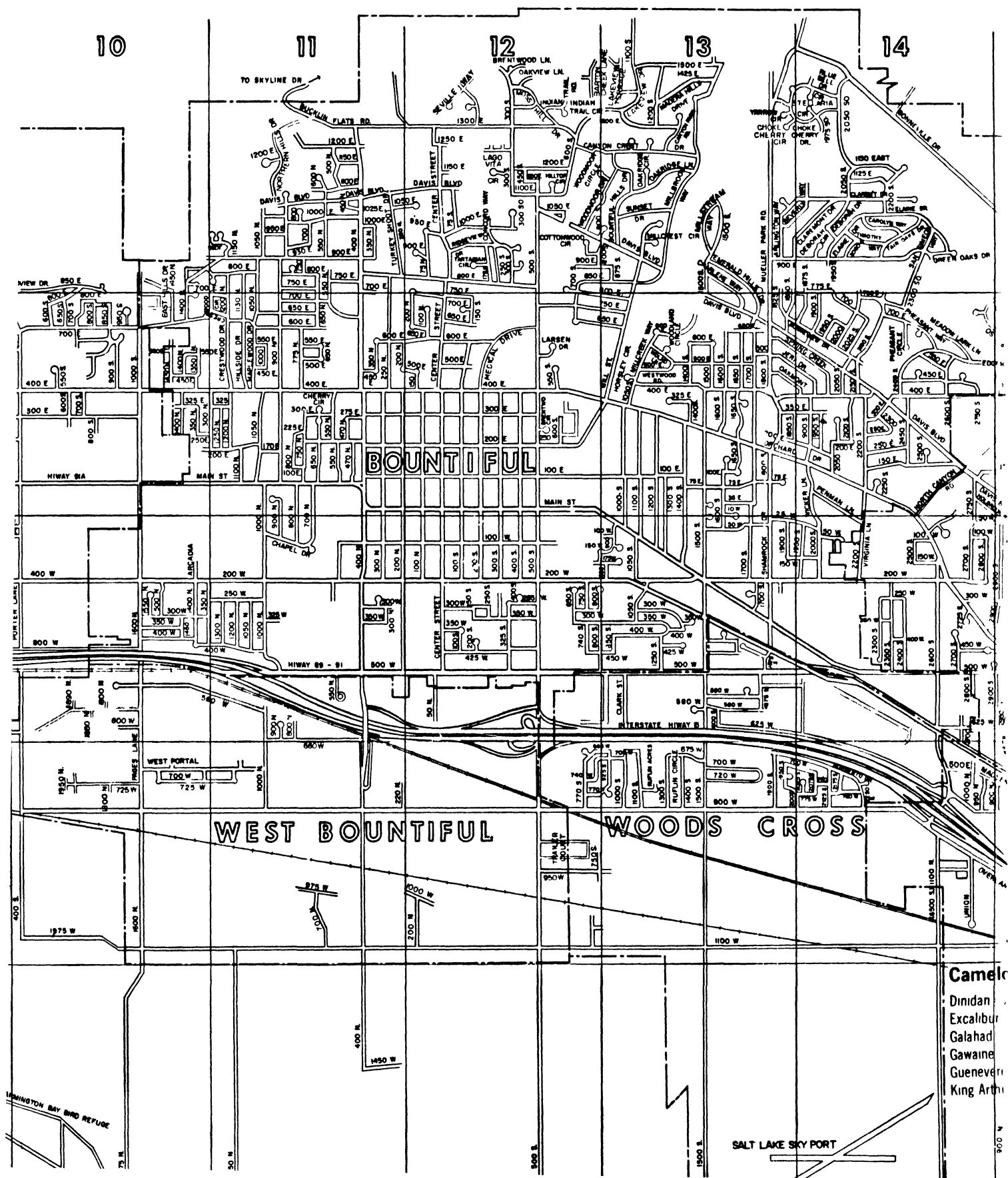
The Supreme Court should reverse the judgment of the trial court and remand the cause for trial on the issues raised under the Second Count of the complaint for acquisition by eminent domain of any additional property to be taken from Rileys.

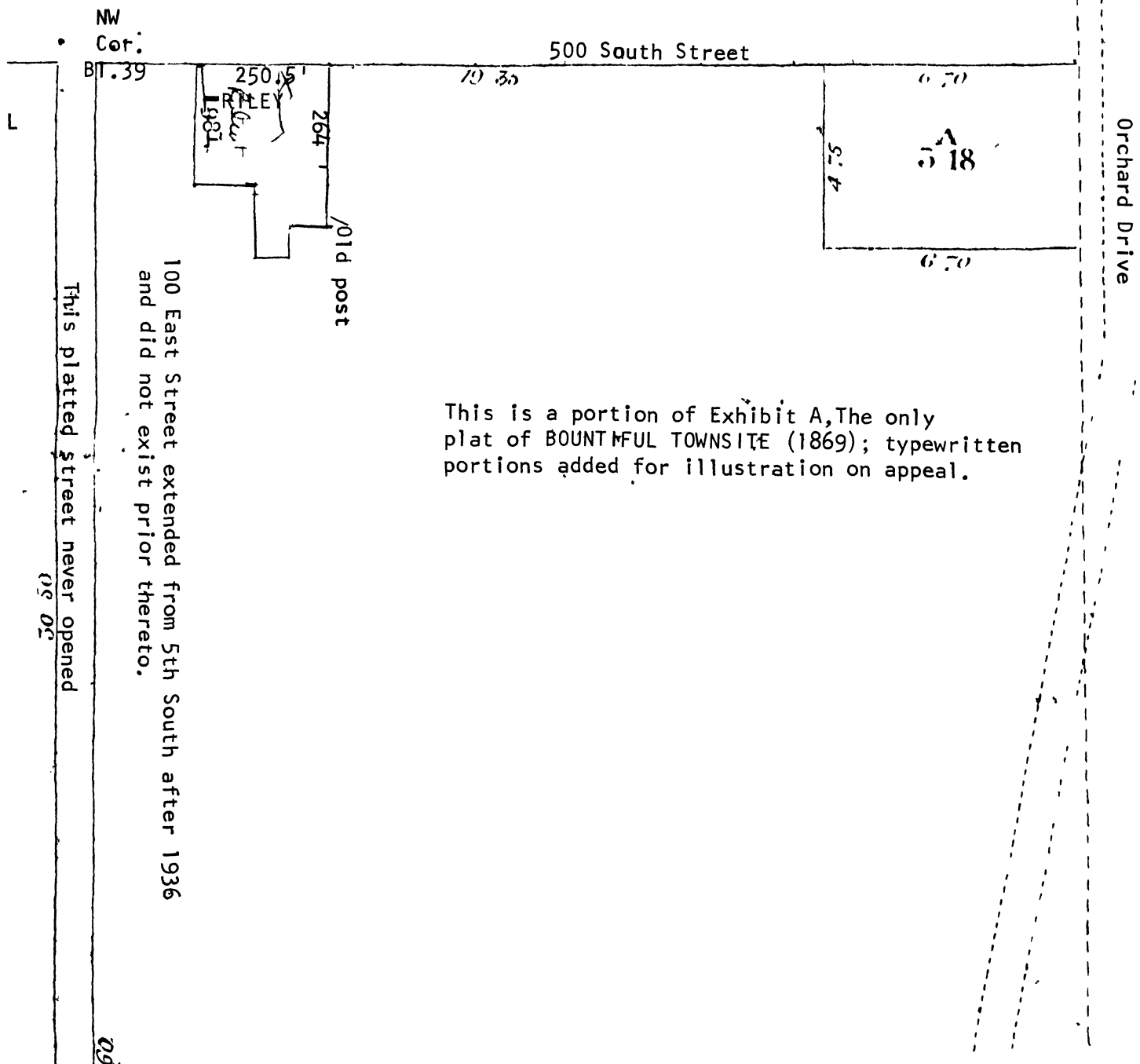
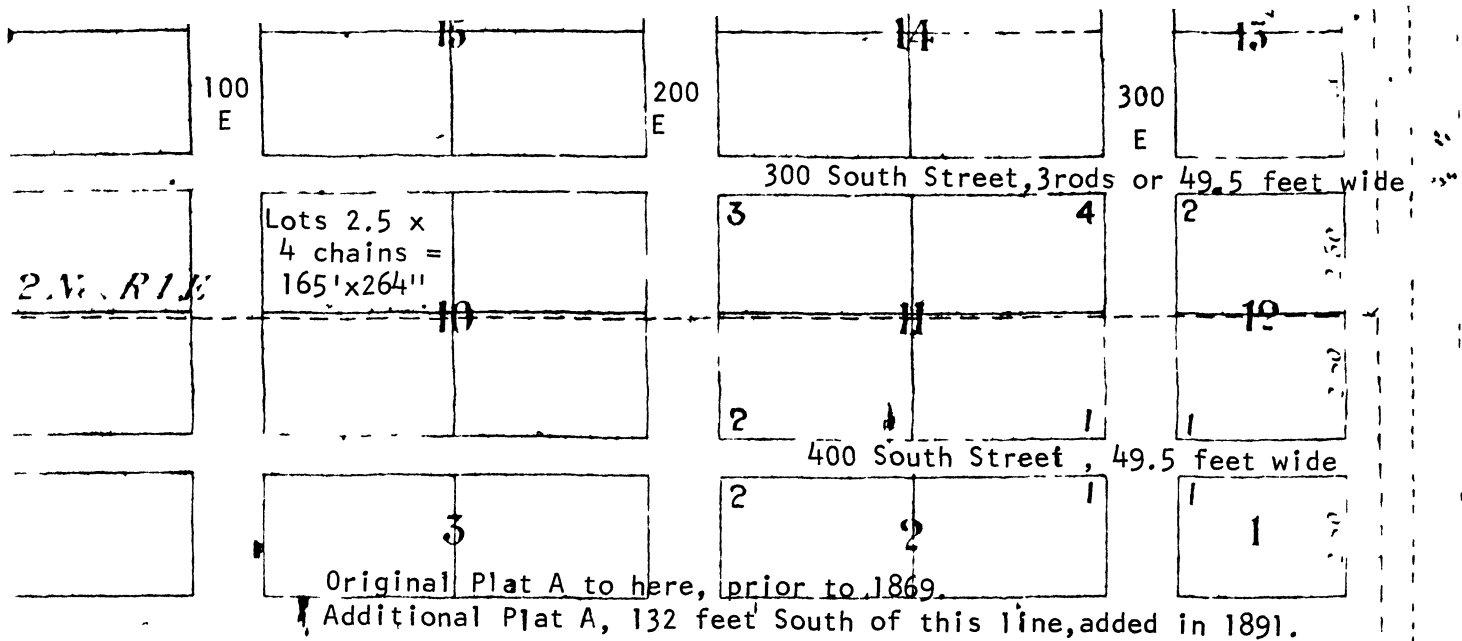
Respectfully,


George K. Fadel

Copies delivered to Mr. Layne B. Forbes, Attorney for Respondent, 790 South 100 East, Bountiful, Utah, 84010, this 15th day of September, 1986.









Officers or agents to deliver moneys, books, etc., to their successors.

(59.) SEC. 8. Officers or agents, contemplated in this act, shall deliver to their successors in office all moneys, books, papers and other property belonging to the office, and take a receipt therefor, and when from the Territorial treasurer deposit an attested copy thereof with the auditor of public accounts; when from the county treasurer deposit said copy with the clerk of the county court, which copies shall be deposited within thirty days from the date of receipt.

An Act authorizing and requiring the auditor of public accounts to procure seals and for other purposes.

[Approved February 15, 1872.]

Territorial seal.

(60.) SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That the auditor of public accounts be, and is hereby authorized and required to procure a new seal for the Territorial secretary's office; the pattern and design of said seal to be the same as the original Territorial seal, excepting the year of date, which shall be represented by figures, and not as in the original by Roman letters; said seal to be two inches in diameter.

Seal for auditor.

(61.) SEC. 2. The auditor of public accounts is authorized and required to procure a suitable seal of office, and to impress said seal on all warrants, and on all other official papers issued by him; and for the amount of costs of said seals, he is herein authorized to draw on the Territorial treasurer.

SEC. 3. (1)

Treasurer to procure canceling stamp.

(62.) SEC. 4. It shall be the duty of the Territorial treasurer to procure a proper canceling stamp, and imprint the same on all auditor's warrants redeemed by him, and deposit said warrants in his office.

An Ordinance creating a surveyor general's office, &c.

[Approved March 2, 1850.]

Providing for election of surveyor general.

(63.) SEC. 1. *Be it ordained by the General Assembly of the State of Deseret:* That a Surveyor General for the State shall be elected by the General Assembly, whose term of office shall be four years, and until his successor is elect-

(1) This section authorized the calling in of certain outstanding warrants.

ed and qualified, unless sooner superseded by legislative election. (1)

(64.) SEC. 2. The surveyor general shall take an oath To take oath of office and give bonds. of office and give bond and security to be approved by the auditor of public accounts, and filed in his office.

(65.) SEC. 3. The surveyor general shall keep a record Duties of. of all surveys made by himself or reported to him by other surveyors, in a book suitable for the purpose. He shall also have a general superintendence and supervision of all surveys of land made within the State.

(66.) SEC. 4. It shall be the duty of the surveyor general, and all county surveyors, to supervise all surveys made in their respective jurisdiction, that the same may be accurate, and no report shall be filed for record until the same shall be certified to by the surveyor general or county surveyor, as being correct. Same.

(67.) SEC. 5. All surveys made in this State shall be made to correspond with the original survey of Salt Lake City, and in all new surveys certificates approved by authorized surveyors shall be considered title of possession to the holding [holders] of the same for the amount of land therein described. All surveys made to correspond with original survey.

An Act to more clearly authorize the surveyor general to give certificates of his surveys, and to further legalize the certificates he has given.

[Approved January 19, 1866.]

(68.) SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That the surveyor general is hereby authorized and required to give, to the person for whom he makes a survey, a certificate thereof, describing the tract, block, or lot, and specifying its area; and such certificate shall be title of possession to the person holding it. To give certain certificates.

(69.) SEC. 2. Certificates of surveys, given by the surveyor general, previous to this act taking effect, are hereby made valid. Former certificates validated.

(1) As provided by an act approved Jan. 19, 1866.

COMPILED LAWS OF UTAH.

An Act to regulate surveyors and surveying.

[Approved March 3, 1852.]

SECS. 1, 2, 3, 4, 5, 6, 7. (1)

Books, etc., to
be property of
Territory.

(70.) SEC. 8. All books, records, plots and papers of surveys made within the Territory, kept by and in the possession of the surveyor general appertaining to his office, are hereby made the property of the said Territory, and it shall be his duty to transmit the same to his successor in office.

An Act creating the office of sealer of weights and measures for the Territory of Utah.

[Approved January 14, 1857.]

Election of
sealer of
weights and
measures.

(71.) SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That there shall be elected by the joint vote of the Legislative Assembly, a Sealer of Weights and Measures, whose term of office shall be four years, and until his successor is elected and qualified, unless sooner superseded by legislative election, who shall, immediately after receiving official notice of his election, give bonds with approved security, to the acceptance of, and filed with, the auditor of public accounts, and be commissioned by the governor as other Territorial officers. (2)

Duties of.

(72.) SEC. 2. It shall be the duty of the person so elected, to procure, as soon as practicable after his election, a full set of weights and measures, which shall be according to the seal and standard of the United States; who shall appoint a deputy in each organized county, on application of the county court, except the county in which he resides, and shall furnish said deputy with a set of weights and measures at the expense of the county making application.

Weights, etc.,
gauged and
sealed.

(73.) SEC. 3. All weights and measures used by millers, merchants or any other dealers in dry or wine measures or other merchandise, shall be gauged and sealed according to said standard by the Territorial sealer of weights and measures or his deputy, who is hereby authorized to demand and collect from any person obtaining from him his official seal, to any weight or measure, a reasonable compensation for the same.

(1) Refer to county surveyors, and will be found under that head.

(2) As provided by an act approved Jan. 19, 1856.

An Act to regulate surveyors and surveying.

[Approved March 3, 1852.]

(226.) SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That the office of County Surveyor, be and hereby is created; and that there shall be a county surveyor to be elected in each county by the qualified voters at the next general election, whose term of office shall be two years, and until his successor in office shall be qualified. County surveyors.
Term of office.

(227.) SEC. 2. The county surveyor shall, before entering upon the duties of his office, take an oath of office, and give bonds and security, to be approved by the probate judge, and to be filed in the office of the clerk of the probate court. Bond and oath.

(228.) SEC. 3. The county surveyor shall, within thirty days after completing any survey, make true copies or diagrams of the same, and transmit one to the surveyor general, and one to the county recorder; and give a certificate of such survey to the person for whom it was made, describing the tract, block or lot, and number of acres contained; and such certificate shall be title of possession to the person or persons holding the same. To whom copies of survey transmitted.

(229.) SEC. 4. Where any survey has been made within this Territory, and the bounds cannot be identified, and disputes arise between rightful claimants, respecting said lines and bounds, the parties so in dispute, or either of them, may, by notifying the other party, of his, her, or their intention, have a re-survey of said lines so in dispute, to be re-surveyed by either the surveyor general, or the county surveyor, at the option of the party, or parties so requiring such re-survey. Should the parties or either of them be dissatisfied with such re-survey, they, or either of them, may, at his, her, or their expense, have another re-survey by both the surveyor general and county surveyor, whose duty it shall be to make the re-survey as near like the former survey as they can, and such re-survey shall be final, and establish such bounds. When re-survey may be had.

(230.) SEC. 5. Where any transfer shall be made of any surveyed lands, or part or parts thereof, it shall be the duty of the transferer to certify in writing such transfer to the person to whom the transfer is made, with a full description of what part or parts, how much or length of line or lines, and number of acres, and the person or persons to whom Duty of person transferring surveyed lands.

transferred; to legalize a claim to such land, shall within thirty days thereafter cause such transfer to be recorded in the county recorder's office.

Survey void
in certain
contingencies

(231.) SEC. 6. If any surveyor shall survey land or lands for the purpose of cultivation, where to irrigate it would rob other previously cultivated lands of the needful portion of water, such last survey shall be void for cultivating purposes.

Duty in case
of joint en-
closure.

(232.) SEC. 7. Whenever a surveyor shall survey a piece of land for a joint enclosure, he shall plot, and number the fence around the survey, noting the length of each person's portion of fence.

SEC. 8. (1)

An Act pertaining to the duties of county surveyors.

[Approved January 19, 1855.]

What records
and books to
keep.

(233.) SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That each county surveyor shall keep a book, in which shall be recorded all the blocks and lots of each survey by him made; also a record of all certificates by him given, which certificates shall certify the number of block and lot, with the number of acres or square rods in each lot, and to whom given which, when countersigned by one or more of the selectmen, shall be filed in the county recorder's office within thirty days from the date thereof. No certificate shall be valid, unless filed in the recorder's office, as provided for in this act. The book thus kept is hereby made the property of the county, and shall be delivered to his successor in office; said record shall be open to the inspection of any person having an interest therein.

What and
when corners
to be made.

(234.) SEC. 2. It shall be the duty of each surveyor to make a sufficient corner (of stone or wood) at the southeast corner of each survey by him made, and make a record of said corner on his return diagrams.

(1) Refers to surveyor general's office, and will be found under that head. See sec. (70.)